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IN THE
COURT OF APPEALS OF INDIANA

TIMOTHY A. WOOLUM, SR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0602-CR-115
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis D. Carroll, Judge
Cause No. 48D01-0504-FA-115

February 14, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Timothy Woolum, Sr., appeals his sixteen-year sentence after pleading guilty to dealing in cocaine, a Class B felony. Woolum raises for review the issues of whether his sentence is proper and appropriate. We affirm Woolum's sentence, concluding that the trial court did not impermissibly rely upon elements of the crime or give too much weight to Woolum's criminal history in order to enhance his sentence, which was appropriate given the nature of the offense and the character of the offender.

Facts and Procedural History

On April 23, 2005, the Madison County Drug Task Force searched Woolum's home pursuant to a warrant. Woolum was in the living room with three other individuals, including his twenty-four year old son. A bag of white powder, which later tested positive as approximately 18.9 grams of cocaine, was discovered on a table in front of the couch where Woolum was seated. Three clear plastic bags found in the living room contained approximately 2.6, 3.8, and 1.4 grams of cocaine, respectively. A digital scale was located under the couch. In Woolum's bedroom, a search of a lockbox revealed a clear bag containing what later tested positive as approximately 41.9 grams of cocaine. The lockbox also contained $14,000.00. Woolum had $1,290.00 on his person at the time of arrest, and a loaded nine-millimeter handgun and other drugs were also seized at the scene. Woolum's son made a statement implicating his father in the selling of cocaine to a female customer earlier that day.

Woolum was charged with dealing in cocaine as a Class A felony, dealing in a

controlled substance, a Class B felony, dealing in a controlled substance, a Class C felony, possession of marijuana, a Class A misdemeanor, and maintaining a common nuisance, a Class D felony. Under a plea agreement with the State, Woolum pled guilty to dealing in cocaine, reduced from a Class A felony to a Class B felony. In return, the State dropped the other charges. At sentencing, the trial court considered aggravating and mitigating circumstances, ultimately imposing the enhanced term of sixteen years, thirteen executed with three suspended to probation. This appeal followed.

Discussion and Decision

I. Woolum's Sentence

Woolum contends that his sentence is both improper and inappropriate. Sentencing decisions, including whether to enhance a sentence, are within the sentencing court's discretion and will be reversed only for an abuse of discretion. Edmonds v. State, 840 N.E.2d 456, 461 (Ind. Ct. App. 2006), trans. denied, cert. denied, 127 S.Ct. 497 (Oct. 30, 2006). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Henderson v. State, 848 N.E.2d 341, 344 (Ind. Ct. App. 2006). Here, Woolum committed the offense on April 23, 2005, pled guilty on December 27, 2005, and was sentenced on January 23, 2006. Amendment of Indiana's sentencing statutes took effect during this interval.[1] Therefore, when considering

[1] Our legislature responded to Blakely v. Washington, 542 U.S. 296 (2004), by amending our sentencing statutes to replace "presumptive" sentences with "advisory" sentences, effective April 25, 2005. Weaver v. State, 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006), trans. denied. Under the new advisory sentencing scheme, "a court may impose any sentence that is authorized by statute and permissible under the Indiana Constitution 'regardless of the presence or absence of aggravating circumstances or mitigating

the propriety of the trial court's decision in this case, we address both versions of the sentencing statute and ultimately reach the same outcome.

A. Sentence Enhancement

Woolum argues the trial court impermissibly enhanced his sentence based upon the elements of the crime to which he pled guilty, dealing in cocaine, and gave too much weight to his criminal history as an aggravating circumstance. We disagree.

1. Presumptive Sentencing Scheme

Prior to amendment of Indiana's sentencing scheme, Woolum was subject to imprisonment "for a fixed term of ten (10) years, with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances." Ind. Code § 35-50-2-5. Modification of a presumptive sentence based upon aggravating or mitigating circumstances requires the trial court to identify all significant mitigating and aggravating circumstances, state the specific reason why each circumstance is determined to be mitigating or aggravating, and articulate its evaluation and balancing of the

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circumstances.'" Id. (quoting Ind. Code § 35-38-1-7.1(d)). Thus, while under the previous presumptive sentencing scheme, a sentence must be supported by Blakely-appropriate aggravators and mitigators, under the new advisory sentencing scheme a trial court may impose any sentence within the proper statutory range regardless of the presence or absence of aggravators or mitigators.

There is a split on this court as to whether the advisory sentencing scheme should be applied retroactively. Compare Weaver, 845 N.E.2d at 1070 (concluding that application of advisory sentencing statute violates the prohibition against *ex post facto* laws if defendant was convicted before effective date of the advisory sentencing statutes but was sentenced after) and Settle v. State, 709 N.E.2d 34, 35 (Ind. Ct. App. 1999) (sentencing statute in effect at the time of the offense, rather than at the time of conviction or sentencing, controls) with Samaniego-Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (concluding that change from presumptive sentences to advisory sentences is procedural rather than substantive and therefore application of advisory sentencing scheme is proper when defendant is sentenced after effective date of amendment even though offense was committed before). Our supreme court has not yet resolved this issue. In this case, the outcome is the same regardless of which sentencing scheme is applied, and therefore we need not decide the issue of retroactivity herein.

circumstances. White v. State, 847 N.E.2d 1043, 1045 (Ind. Ct. App. 2006). We examine both the written sentencing order and comments made by the trial court during the sentencing hearing to determine whether the trial court adequately explained its reasons for the sentence. Vazquez v. State, 839 N.E.2d 1229, 1232 (Ind. Ct. App. 2005), trans. denied.

In the sentencing order, the trial court stated:

> The Court finds aggravation: 1) defendant has a history of criminal or delinquent activity; 2) the circumstances of the crime; [and] 3) this is not an isolated event. The Court finds mitigation: 1) the defendant plead [sic] guilty to the instant offense saving the State the time and cost of trial; 2) defendant accepts responsibility for his actions; and 3) defendant shows remorse.

Appendix of the Appellant at 99. During the sentencing hearing, with regard to Woolum's guilty plea, the trial court explained that "the value of the mitigation is undercut a bit by that substantial benefit that [he] received from pleading guilty and cutting [his] losses or cutting [his] exposure." Transcript at 27. Acknowledging the "modest" nature of Woolum's criminal history, the trial court relied on the existence of "some criminal history, some contacts with law enforcement" as an aggravating circumstance.[2] Id. Additionally, the trial court concluded that the "circumstances of this crime . . . is itself an aggravating circumstance." Id. The trial court specified that Woolum's activity was "not an isolated event, but a significant, major, ongoing criminal enterprise," a particularized circumstance based upon the fact that "there was a very large amount of cocaine involved, that there was a

[2] During the sentencing hearing, Woolum informed the trial court of errors in the criminal history as depicted in Woolum's pre-sentence report. It was ultimately concluded that Woolum's criminal history consisted of a conviction in 1982 for assault, a 2004 charge for operating while intoxicated handled through completion of a deferral program, and two charges pending in Madison County: dealing in marijuana and

loaded firearm, . . . the P[robable] C[ause] Affidavit . . . , [and] the conversation . . . at [Woolum's] guilty plea hearing." Id. After considering all of these factors, the trial court imposed an enhanced sentence of sixteen years.

Woolum contends the trial court's reliance on his participation in an ongoing, criminal enterprise "is nothing more than another way of stating that Woolum was engaged in the act of dealing cocaine, which is an element of the very charge to which he plead [sic] guilty."[3] Brief of the Appellant at 7. However, prior to amendment of the sentencing statutes, Indiana Code section 35-38-1-7.1(a)(2) required the trial court to consider "the nature and circumstances of the crime committed" when imposing a sentence. Thus, "while a court may not use a factor constituting a material element of an offense as an aggravating circumstance, it may look to the particularized circumstances of the criminal act." Scott v. State, 840 N.E.2d 376, 382 (Ind. Ct. App. 2006), trans. denied. "Although the particular manner in which a crime is committed may constitute an aggravating factor, a trial court should specify why a defendant deserves an enhanced sentence under the particular circumstances." Henderson v. State, 769 N.E.2d 172, 180 (Ind. 2002) (citations omitted). A sentence cannot be enhanced based on particularized circumstances if the trial court "fails to specify any particular manner or circumstances related to the commission of the crimes beyond the material elements of the crimes for which the defendant was convicted." Id.

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possession of a sawed-off shotgun. On appeal, Woolum does not dispute the contents of his criminal history, but rather the weight assigned to it.

[3] Indiana law defines the crime of dealing in cocaine as knowingly or intentionally possessing cocaine with the intent to deliver it. Ind. Code § 35-48-4-1(a)(2).

Here, by describing Woolum's crime as part of a significant and ongoing criminal enterprise, the trial court specified that the amount of cocaine found, the loaded firearm, the information contained in the probable cause affidavit, and the trial court's discussion with Woolum at the guilty plea hearing all supported enhancement based upon the particularized circumstances of his crime. Woolum acknowledged the fact that a large amount of cocaine was discovered in his residence, some prepackaged in plastic bags and pill bottles in several locations. He also acknowledged the digital scale and the loaded handgun at the scene, as well as a large amount of cash, which he claimed was a loan from a friend. Thus, the record discloses that the particularized circumstances of the offense constitute an aggravator reasonably relied upon by the trial court. See Kendall v. State, 825 N.E.2d 439, 445, 452 (Ind. Ct. App. 2005) (particular facts and circumstances, including substantial amount of cocaine, large amounts of money, and weapons, supported enhancement of sentence for dealing in cocaine), aff'd in relevant part, 849 N.E.2d 1149 (Ind. 2006), petition for cert. filed (No. 06-6635) (Sept. 2006).

Woolum also contends the trial court improperly relied upon the amount of cocaine found at his residence as an aggravating factor because the amount of the drug is the distinguishing factor between the crime charged against him, a Class A felony, and the crime to which he pled guilty, a Class B felony. Woolum points to Conwell v. State, 542 N.E.2d 1024, 1025 (Ind. Ct. App. 1989), where we explained:

> [W]hen a defendant pleads guilty to an included offense, the element(s) distinguishing it from the greater offense . . . may not be used as an aggravating circumstance to enhance the sentence. The trial court is entitled to refuse to accept the plea to the included offense, but it may not attempt to

> sentence as if the defendant had pled to the greater offense by using the distinguishing element(s) as an aggravating factor.

Nevertheless, although the trial court is "prohibited from imposing the maximum sentence . . . in an effort to compensate for the State's decision" in making a plea agreement for a lesser offense, it does not abuse its discretion to the extent that the elements required to constitute the reduced offense are exceeded. Patterson v. State, 846 N.E.2d 723, 728 (Ind. Ct. App. 2006) (internal quotation and citation omitted). Additionally, the fact that the total amount of cocaine found at Woolum's residence far exceeded even that needed for a Class A felony was not used as an individual aggravator, but rather in conjunction with other aspects of his offense that led the trial court to consider it a major, ongoing criminal enterprise. Therefore, the trial court did not abuse its discretion by relying upon the facts and circumstances of Woolum's crime when imposing a sixteen-year sentence.

Lastly, Woolum argues that his "prior criminal history did not support the Trial Court's decision to enhance his sentence." Br. of Appellant at 8-9. "The significance afforded to a defendant's criminal history depends upon the gravity, nature, and number of the prior offenses as they relate to the current offense." Williams v. State, 830 N.E.2d 107, 113 (Ind. Ct. App. 2005), trans. denied. Even a criminal history composed solely of misdemeanor convictions may be used to enhance a sentence. Id. at 114. Here, the trial court considered Woolum's criminal history to be modest in nature. Rather than relying only on the criminal history, the trial court primarily concerned itself with the nature and circumstances of Woolum's offense. It determined these sufficient for enhancement in addition to any aggravating weight afforded to Woolum's criminal history. Moreover,

because a single aggravating factor is sufficient to enhance a sentence, even if the trial court's reliance on Woolum's modest criminal history was improper, it was harmless in light of the facts and circumstances of the crime relied upon as a separate valid aggravator. Edwards v. State, 842 N.E.2d 849, 855 (Ind. Ct. App. 2006). As such, the trial court's sentencing decision is not clearly against the logic and effect of the facts and circumstances before us.

2. Advisory Sentencing Scheme

Application of Indiana's sentencing statute as amended results in the imposition of a sentence "for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years." Ind. Code § 35-50-2-5. An advisory sentence is "a guideline sentence that the court may voluntarily consider as the midpoint between the maximum sentence and the minimum sentence." Ind. Code § 35-50-2-1.3(a). Moreover, "regardless of the presence or absence of aggravating circumstances or mitigating circumstances," a trial court may impose any sentence that is authorized by statute, and permissible under the Constitution of the State of Indiana. Ind. Code § 35-38-1-7.1(d). Although our supreme court has not yet interpreted this statute, its plain language indicates that "a sentencing court is under no obligation to find, consider, or weigh either aggravating or mitigating circumstances." Fuller v. State, 852 N.E.2d 22, 26 (Ind. Ct. App. 2006), trans. denied. Therefore, under the amended sentencing scheme, regardless of aggravators or mitigators, the trial court could not abuse its discretion by imposing upon Woolum a sixteen-year term within the range authorized by statute for his offense.

Even so, if a trial court finds, identifies, and balances aggravating and mitigating circumstances, it must do so correctly, and we will ensure that the trial court did so. See Ind. Code § 35-38-1-3 (if the court finds aggravating or mitigating circumstances, the trial court shall include a statement of reasons for selecting the sentence imposed). As previously discussed, the trial court acted within its discretion in assigning some weight to Woolum's modest criminal history and heavier weight to the facts and circumstances of the crime Woolum committed. Woolum was therefore properly sentenced under the advisory sentencing scheme.

B. Appropriateness

Woolum also asks us to exercise our authority to review and revise his sentence, which we may do if, after due consideration of the sentencing court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). We exercise great restraint in doing so, recognizing the special expertise of the trial bench in making sentencing decisions. Scott, 840 N.E.2d at 381.

Almost seventy grams of cocaine was discovered at Woolum's residence, some of which was prepackaged in small amounts. A digital scale, large sums of cash, other drugs, and a loaded firearm were also discovered. Earlier on the day of his arrest, according to the statement of Woolum's son, Woolum sold a woman an amount of cocaine from his residence. All of these facts are indicative of Woolum's continuing criminal enterprise. His character is reflected not only by his previous contacts with law enforcement, but also by the fact that he engaged in illicit behavior while accompanied by his twenty-four-year-old son. As such,

we cannot say Woolum's sentence is inappropriate in light of his offense or his character.

Conclusion

The trial court properly determined and imposed a sixteen-year sentence on Woolum. We therefore affirm his sentence.

Affirmed.

BARNES, J., concurs.

SULLIVAN, J., concurs with separate opinion.

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	)	
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	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

SULLIVAN, Judge, concurring

I concur, but in doing so would express the view that Settle v. State and Weaver v. State, as set forth in footnote 1 of the majority decision, reflect the correct application of the new and the old sentencing schemes, as opposed to the analysis contained in Samaniego-Hernandez v. State, also noted in the footnote. In this regard I deem it unnecessary for our decision to discuss the sentence imposed under an analysis of the "advisory" sentencing scheme.

However, perhaps more importantly, I find no significance to the majority's statement that: "Amendment of Indiana's sentencing statutes took place during this interval [between the date of the offense committed and his sentencing]." Slip op. at 3. My position in this respect is as set forth in my separate concurrence in Townsend v. State, No. 43A03-0604-CR-183, ___ N.E.2d ___ (Ind. Ct. App. February 7, 2007).